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Legally Speaking-So Many eBooks, So Little Time

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The Google Books case is tantalizingly significant to the ongoing debate over what constitutes “fair use” in the digitization of library books. The jury (or at least the judge) is still out on this issue, however. It’s a fascinating portrait of the modern tension between libraries, publishers, authors, and the voracious appetite of the Internet community for “data.”

As readers may recall, in 2004, Google announced that it had entered into agreements with several major research libraries to digitize library books. The jury (or at least the judge) is still out on this issue, however. It’s a fascinating portrait of the modern tension between libraries, publishers, authors, and the voracious appetite of the Internet community for “data.”

Accordingly, Judge Baer held that:

The use to which the works in the [HathiTrust Digital Library] are put is transformative because the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material. The search capabilities of the HDL have already given rise to new methods of academic inquiry such as text mining. [Id. at 460.]

Judge Baer therefore dismissed the Authors Guild’s complaint against the libraries.

The Authors Guild has appealed the HathiTrust decision to the Second Circuit, and briefing is in process. It is hard to predict whether the appellate court will agree with the district court’s admittedly unprecedented application of the concept of “transformation” in a way that permits copying of the complete text of millions of books. Nor is it clear whether it was appropriate for the court to ignore Google’s role in the copying process or Google’s for-profit goals in commercializing the digitized books. (“Plaintiffs argue that Defendants’ uses cannot be considered non-commercial because of their relationship with Google. Although the relationship between Google and Defendants is potentially relevant to the uses of the works made by Google, that issue is not before this Court.” 902 F. Supp. 2d at 462 n.27.)

Turning back to the Google Books case now that it — and in turn the fair use issue — is before Judge Chin again, the end result is hard to predict. Recognizing that, unlike the libraries, Google itself clearly has a commercial purpose in mind for its digitization program, it is questionable whether the HathiTrust decision will be a harbinger of Judge Chin’s decision on fair use. A different omen of things to come may
Everyone! Reading and happy library-lifehacking, communication and project management for the buck, staff could employ some of the techniques they are navigating. To provide even more bang for their buck, staff could easily finish the chapters or two, they could read a few minutes a day to read a book worth their time.

In her book, The Five Languages of Appreciation in the Workplace: A Practical Tool to Build Trust and Connection at Work, Brené Brown, a shame researcher, describes five ways to show people you appreciate them. These are:

1. Affirmation of Effort: Acknowledge the effort someone put into a task, even if the outcome was not what you expected.
2. Affirmation of Ability: Recognize the person's skills and abilities.
3. Recognition of Outcomes: Praise the results achieved, even if they were not what you intended.
4. Appreciation of Contribution: Acknowledge the impact someone had on the team or organization.
5. Appreciation of Character: Highlight the person's values and character traits.

Brown argues that these five languages of appreciation can be used to build trust and connection at work, leading to more positive and productive relationships. By acknowledging and valuing one another, we can create a more supportive and collaborative workplace culture.

The circumstances of the publishers’ simultaneous adoption of the agency agreement model advocated by Apple is itself powerful evidence of their agreement:

In adopting a model that deprived each of them of a stream of expected revenue from the sale of eBooks on the wholesale model, the Publisher Defendants all acted against their near-term financial interests; and each of the Publisher Defendants acted in identical ways even though each was also afraid of retaliation by Amazon. [Opinion at 120.]

In finding that Apple has engaged in an illegal conspiracy to restrain trade, the district court rejected Apple’s argument that the court would reverse well-recognized antitrust law if it held that the publishers’ MFN clause was illegal. The court emphasized that:

The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers. That does not, however, make it lawful for a company to use those business practices to effect an unreasonable restraint of trade. And here, the evidence taken as a whole paints quite a different picture — a clear portrait of a conscious commitment to cross a line and engage in illegal behavior with the Publisher Defendants to eliminate retail price competition in order to raise retail prices. [Opinion at 132.]

In short, “[t]he totality of the evidence leads inexorably to the finding that Apple chose to join forces with the Publisher Defendants to raise eBook prices and equipped them with the means to do so.” [Id. at 134-35.]

Judge Cote even quoted Apple founder Steve Jobs’ own words against his company, pointing out that, on the day of the launch of the iPad, Jobs told a reporter that “Amazon’s $9.99 price for [a book newly offered on iPad for $14.99] would be irrelevant because soon all prices will be the same.” [Id. at 149.]

One might think that it is amazing that one of America’s most innovative and revered high-tech companies would land itself in such a pickle. But from a review of the testimony and documents quoted in the district court’s opinion, it was clear to Judge Cote that Apple’s executives had a totally tin ear and a blind eye to the obvious price-fixing conspiracy that they were orchestrating. The publishers’ executives were no better.

The five publishers in the case have already settled the states’ claims against them for $166 million in damages. (Their settlement with the DOJ involved only injunctive relief.) This case will also cost Apple a pretty penny in damage claims before all is said and done. And it should also remind American businesses that merely calling a sales term a “most favored nation” clause does not immunize the arrangement from federal or state antitrust laws.

The publishers and Apple began meeting in December 2009 and, by January 2010, “agreed to work together to eliminate retail price competition in the eBook market and raise the price of eBooks above $9.99.” [Opinion at 11.]

According to the opinion Apple was the linchpin in the conspiracy between and among Apple and the publishers. “It provided the key to the Publishers’ ability to control the vision, the format, the timetable, and the coordination that they needed to raise eBook prices.” [Id.]

Apple executed individual “agency agreements” with each of the publishers under which Apple would act as an “agent” in selling eBooks at a retail price set by the publishers (which were $3 to $5 higher than Amazon’s $9.99 retail price).

The agreements also included a price parity provision, or Most-Favored-Nation clause (“MFN”), which not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor’s e-bookstore, but also imposed a severe financial penalty upon the Publisher if they did not force Amazon and other retailers similarly to change their business models and e-cede control over eBook pricing to the publishers.

On April 11, 2012, the Department of Justice filed a civil suit against Apple and five of the six largest U.S. publishers. (Thirty-three states filed their own cases against the defendants, which were joined with the DOJ’s suit.) On the same day, the DOJ filed a proposed consent decree settling the case against Hachette, HarperCollins, and Simon & Schuster. After considerable fireworks, the settlement was approved by the court, and settlements subsequently followed with the other publishers. Only Apple chose to go to trial.

In the court’s view, the MFN “eliminated any risk that Apple would ever have to compete on price when selling eBooks, while as a practical matter forcing the Publishers to adopt the agency model across the board.” [Opinion at 48.]

The MFN clause “literally stiffened the spine[s] of the Publisher Defendants to ensure that they would demand new terms from Amazon.” [Id. at 56.]

And during their negotiations with Amazon, the publishers shared their progress with one another. Since the laws of supply and demand were “the laws of supply and demand were the lynchpin in the conspiracy between and among Apple and the Publishers. It provided the key to the Publishers’ ability to control the vision, the format, the timetable, and the coordination that they needed to raise eBook prices.” [Id.]

Apple’soriary agreement, which allowed Apple to dictate the terms on which the publishers would distribute their eBooks, was part of a larger strategy to eliminate retail price competition in order to raise retail prices. [Opinion at 132.]

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